(4)

No. 97-7164

In The

Supreme Court of the United States

October Term, 1997

FRANCOIS HOLLOWAY, also known as ABDU ALI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

JOINT APPENDIX

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Petition For Certiorari Filed December 12, 1997
Certiorari Granted April 27, 1998

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12/12/95	Evidence commences.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

– against –

TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", DAVID VALENTINE, PAUL SCAGLIONE and JEFFREY DRAKE,

Defendants.

----------X

INDICTMENT

Cr. No. _____
(T. 18, U.S.C. §§ 371, 511, 2119, 2321, 2322, 924(c), 2 and 3551 *et seq.*)

THE GRAND JURY CHARGES:

INTRODUCTION TO ALL COUNTS

At all times relevant to this Indictment:

1. A house, backyard and driveway, owned by defendant CHARLES ROBINSON, located at 150-59 115th Drive, Jamaica, New York, was used for the purpose of dismantling carjacked and stolen cars. This location was operated as a Chop Shop, that is, a location where persons, including the defendants TEDDY ARNOLD and CHARLES ROBINSON, received and disassembled stolen motor vehicles in order to alter, deface, destroy, disguise, falsify, obliterate and remove the identity, including the

vehicle identification number, of such vehicles and vehicle parts, and to distribute, sell and dispose of the parts in interstate commerce. This property will be referred to hereinafter as "the Robinson Chop Shop".

2. East Coast Auto Collision was located in a warehouse and an adjoining uncovered, fenced yard located at 95-45 and 95-50 Tuckerton Street in Jamaica, New York.

3. Drake's Auto Collision was a warehouse and an adjoining lot located at 216-20 Hempstead Avenue, Jamaica, New York.

4. Both East Coast Auto Collision and Drake's Auto Collision received motor vehicle parts from stolen motor vehicles disassembled at the Robinson Chop Shop.

COUNT ONE

5. Paragraphs 1 through 4 of this Indictment are hereby repeated and realleged and incorporated as if fully set forth herein.

6. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", DAVID VALENTINE and others did knowingly and wilfully conspire to operate, maintain and control a chop shop, to wit, the Robinson Chop Shop, in violation of Title 18, United States Code, Section 2322.

7. In furtherance of said conspiracy, and for the purpose of effecting the objectives thereof, within the

Eastern District of New York, the defendants committed, among others, the following: -

OVERT ACTS

a. On or about October 10, 1994, the defendant TEDDY ARNOLD instructed the defendant DAVID VALENTINE and others to steal a 1993 Mercury Marquis.

b. On or about October 10, 1994, a 1993 Mercury Marquis was carjacked by the defendant DAVID VALENTINE and others.

c. On or about October 10, 1994, the 1993 Mercury Marquis was delivered to the defendant TEDDY ARNOLD at the Robinson Chop Shop.

d. On or about October 10, 1994, the Mercury Marquis was dismantled at the Robinson Chop Shop.

e. On or about October 14, 1994, the defendant TEDDY ARNOLD instructed the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others to steal a 1990 Nissan Maxima.

f. On or about October 14, 1994, a 1990 Nissan Maxima was carjacked by the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others.

g. On or about October 14, 1994, the 1990 Nissan Maxima was delivered to defendant TEDDY ARNOLD at the Robinson Chop Shop.

h. The Nissan Maxima was dismantled by the defendants TEDDY ARNOLD and DAREL JONES at the Robinson Chop Shop.

(Title 18, United States Code, Sections 371 and 3551 *et seq.*).

COUNT TWO

8. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", DAVID VALENTINE and others did knowingly and wilfully own, operate, maintain, and control a chop shop and conduct operations in a chop shop, to wit, the Robinson Chop Shop.

(Title 18, United States Code, Sections 2322, 2 and 3551 *et seq.*).

COUNT THREE

9. On or about October 10, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1993 Mercury Marquis, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3351 *et seq.*).

COUNT FOUR

10. On or about October 10, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Three above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT FIVE

11. On or about October 12, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1987 Nissan Maxima, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT SIX

12. On or about October 12, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Five above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT SEVEN

13. On or about October 14, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1990 Nissan Maxima, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code Sections 2119, 2 and 3551 *et seq.*).

COUNT EIGHT

14. On or about October 14, 1994 in the Eastern District of New York the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Seven above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT NINE

15. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others, with the intent to

cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1988 Mercedes-Benz 560, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT TEN

16. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Nine above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT ELEVEN

17. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1991 Toyota Celica, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT TWELVE

18. On or about October 15, 1994, in the Eastern District of New York, the defendant FRANCOIS HOLLOWAY, a/k/a "Abdu Ali", and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Eleven above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT THIRTEEN

19. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1994 Nissan Sentra, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT FOURTEEN

20. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Thirteen above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT FIFTEEN

21. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others, with the intent to cause death or serious bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1989 Toyota Corolla, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT SIXTEEN

22. On or about October 19, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Fifteen above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT SEVENTEEN

23. On or about October 21, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE, and others, with the intent to cause death or serious

bodily harm, did knowingly and wilfully take a motor vehicle, to wit: a 1993 Toyota Camry, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

(Title 18, United States Code, Sections 2119, 2 and 3551 *et seq.*).

COUNT EIGHTEEN

24. On or about October 21, 1994, in the Eastern District of New York, the defendant DAVID VALENTINE did knowingly, wilfully and unlawfully use and carry a firearm during and in relation to a crime of violence, to wit: the offense charged in Count Seventeen above.

(Title 18, United States Code, Sections 924(c)(1), 2 and 3551 *et seq.*).

COUNT NINETEEN

25. Paragraphs 1 through 4 of this Indictment are hereby repeated and realleged and incorporated by reference as if fully set forth below.

26. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, PAUL SCAGLIONE, JEFFREY DRAKE and others did knowingly and wilfully conspire to:

A. Remove, obliterate, tamper with and alter identification numbers for motor vehicles and motor vehicle parts, in violation of Title 18 United States Code, Section 511; and

B. Buy, receive, possess, and obtain control of, with intent to sell and otherwise dispose of, motor vehicles and motor vehicle parts, knowing that identification numbers for such motor vehicles and parts had been removed, obliterated, tampered with, and altered, in violation of Title 18, United States Code, Section 2321.

27. In furtherance of said conspiracy, and for the purpose of effecting the objectives thereof, within the Eastern District of New York, the defendants committed, among others, the following:

OVERT ACTS

a. On or about and between October 10, 1994 and October 23, 1994, both dates being approximate and inclusive, the defendant TEDDY ARNOLD delivered a quantity of motor vehicle parts to East Coast Auto Collision. The vehicle identification numbers had been removed from the motor vehicle parts.

b. On or about October 19, 1994, a 1989 Toyota Corolla was carjacked by others at the direction of the defendant DAREL JONES.

c. On or about October 19, 1994, the 1989 Toyota Corolla was delivered to the Robinson Chop Shop.

d. On or about October 19, 1994, the Toyota Corolla was disassembled and its vehicle identification numbers

were removed by the defendant DAREL JONES at the Robinson Chop Shop.

e. On or about October 19, 1994, the defendant DAREL JONES delivered parts from the 1989 Toyota Corolla to Drake's Auto Collision.

f. On or about and between October 25, 1994 and November 11, 1994, the defendants TEDDY ARNOLD and DAREL JONES disassembled motor vehicles at the Robinson Chop Shop.

g. On or about and between October 25, 1994 and November 11, 1994, the defendant DAREL JONES and others delivered a quantity of motor vehicle parts to Drake Auto Collision. The vehicle identification numbers had been removed from the motor vehicle parts delivered to Drake Auto Collision.

h. On or about November 8, 1994, the defendant TEDDY ARNOLD delivered a quantity of motor vehicle parts to East Coast Auto Collision. The vehicle identification numbers of the vehicle parts delivered to East Coast Auto Collision had been removed, obliterated, altered and otherwise tampered with.

(Title 18, United States Code, Sections 371 and 3551 *et seq.*).

COUNT TWENTY

28. On or about and between October 6, 1994 and November 15, 1994, within the Eastern District of New York, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, JEFFREY DRAKE and others did

knowingly and wilfully receive, possess and obtain control of, with intent to sell and otherwise dispose of, motor vehicle parts, to wit: front and rear bumpers, knowing that the identification numbers for said items had been removed.

(Title 18, United States Code, Sections 2321, 2 and 3551 *et seq.*).

COUNT TWENTY-ONE

29. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, JEFFREY DRAKE and others did knowingly remove, obliterate, tamper and alter the identification numbers of motor vehicle parts.

(Title 18, United States Code, Sections 511, 2 and 3551 *et seq.*).

COUNT TWENTY-TWO

30. On or about and between October 6, 1994 and November 15, 1994, within the Eastern District of New York, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, PAUL SCAGLIONE and others did knowingly and wilfully receive, possess of, motor vehicle parts, knowing that the identification numbers for said items had been removed.

(Title 18, United States Code, Sections 2321, 2 and 3551 *et seq.*).

COUNT TWENTY-THREE

31. On or about and between October 6, 1994 and November 15, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants TEDDY ARNOLD, CHARLES ROBINSON, DAREL JONES, PAUL SCAGLIONE and others did knowingly remove, obliterate, tamper and alter the identification numbers of motor vehicle parts.

(Title 18, United States Code, Sections 511, 2 and 3551 *et seq.*).

A TRUE BILL

_____

FOREPERSON

_____

ZACHARY W. CARTER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Illegible
ACTING UNITED STATES ATTORNEY
PURSUANT Illegible

_____

Jury Instructions
(Excerpted from Trial Transcript – Beginning at Pg. 333)

[Tr. 333] Now Counts 7, 9, and 11 all charge the defendant with violations of the Section 2119 of Title 18. Specifically, they read as follows:

Count 7 states:

On or about October 14th, 1994, in the Eastern District of New York, the defendant Francois Holloway, also known as Abdu Ali and others, with the intent to cause death or serious bodily harm, did knowingly and willfully take a motor vehicle, to wit: A 1990 Nissan Maxima, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

Although these are separate charges, they must be considered separately by you. The law with regard to each is the same. They each charge a violation of Section 2119 which provides as follows:

Whoever with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce, from the person or [Tr. 334] presence of another by force and violence or by intimidation or attempts to do so, shall be guilty of a crime under the laws of the United States.

To establish this crime, the government must prove each of the following elements beyond a reasonable doubt.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second – I didn't read Counts 9 and 11.

These elements all relate to all three crimes that are charged in Counts 7, 9, and 11. Let me complete the reading of those counts.

Count 9 is: On or about October 15, 1994, in the Eastern District of New York, the defendant Francois Holloway, also known as Abdu Ali, and others, with the intent to cause death or serious bodily harm, did knowingly and willfully take a motor vehicle, to wit: A 1988 Mercedes-Benz 560, that had been transported, shipped and received in interstate commerce from the person and presence of another, by force and violence and by intimidation.

Count 11 reads: On or about October 15, 1994, in the Eastern District of New York, the defendant Francois Holloway also known as Abdu Ali and others, with the intent to cause death or serious bodily harm, did knowingly and willfully take a motor vehicle, to wit: A 1991 Toyota Celica, that had been transported, shipped and received in interstate commerce from the [Tr. 335] person and presence of another, by force and violence and by intimidation.

All three of these offenses, Count 7, Count 9, Count 11, call for the government to prove each of the following elements beyond a reasonable doubt.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

Fourth, that the motor vehicle taken was transported, shipped or received in interstate commerce.

The first of these elements that the defendant knowingly took or knowingly attempted to take a motor vehicle. As I explained before to do something knowingly is to act purposely and voluntarily and not because of a mistake or accident or other innocent reason.

Now, the defendant need not have been aware of the specific law and rule that his conduct may have violated, but he must act with a specific intent to do whatever it is the law forbids, here take a motor vehicle by force, violence or intimidation.

The second element the government must prove beyond a reasonable doubt is that the taking was committed with the intent [Tr. 336] to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question. I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you.

The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm.

If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all of the elements of the offense including this element. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or [Tr. 337] serious bodily harm at the time of the events you are considering.

Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.

You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contains that the defendant intended to cause death or serious body [sic] harm if the alleged victims had refused to turn over their cars. If

you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Let me also remind you, you must consider each count separately.

[Tr. 338] Serious bodily harm is defined to be "bodily injury" which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a bodily [sic] member, organ, or mental faculty.

This is to be distinguished from "bodily harm" which means cut, abrasion, bruise, burn, or disfigurement, physical pain or any other injury to the body, no matter how temporary.

Proof of intent to cause bodily harm as opposed to serious bodily harm is insufficient.

The third element the government must prove is that the taking of the motor vehicles were accomplished by force or violence or by intimidation.

The government can meet its burden on this element by proving beyond a reasonable doubt either that the defendant used force or violence or that the defendant acted in an intimidating manner, it need not prove both. The phrase "intimidating manner" means that the defendant said or did something that would make an ordinary

person fear bodily harm or for the purpose of causing another person to fear bodily harm.

However, it is not necessary for the government to prove that the victim was actually frightened in order to establish that the defendant acted in an intimidating manner. Your focus should be on the defendant's behavior. Although the government does not have to show that the defendant's behavior caused or could have caused terror, the government does have to show that [Tr. 339] an ordinary person would have feared bodily harm because of it.

The fourth element requires proof that the motor vehicle unlawfully taken was moved in interstate commerce. The government does not have to prove that the defendant knew that the vehicle had moved in interstate commerce. The government can satisfy this element by showing that the motor vehicle had, at any point, previously traveled across a state line.

* * *

[Tr. 349] (Jury Deliberations commence 4:20 p.m.)

(5:05 p.m.)

THE COURT: Does either side have any objection to my just sending the jury back home. We don't need to bring him back here to excuse them.

MR. HANNA: Right.

MR. GARRETT: No objection.

THE COURT: Tell them to go home. Make sure they go out that way.

THE MARSHAL: Yes.

THE COURT: Let's stay here. I want to put the notes on the record.

No sense keeping them waiting.

[Tr. 350] I have jury note No. 1 and 2.

MR. HANNA: The defendant is not here yet, he is on his way up.

THE MARSHAL: What time you want them back, your Honor?

THE COURT: 9:30.

THE COURT: Jury note No. 2 is: We would like to leave at 5 p.m. and return tomorrow.

Pursuant to that, we've decided, without calling the jury into the courtroom, just to send them home. No one objects to that.

Jury note number 1 asks for: "Need a copy of the law stated by Judge on intent."

What I intend to do tomorrow, but I will hear you both on this, is to mark as a court exhibit my full charge and just give them the charge.

Mr. Garrett you want to be heard on that?

MR. GARRETT: I have no objection to that, your Honor.

MR. HANNA: Judge, I do.

I ask that the Court comply with the strict letter of the request, not go beyond the request, and give the jury

exactly what they ask for and no more, which is a copy of the Court's instructions with regard to the issue of intent.

THE COURT: All right. Why don't you prepare, between now and when we reconvene, copy the parts of the charge that relate to intent. I think they are scattered around.

[Tr. 351] In light of that objection, since all they ask for is the charge on intent, I will give the charge only as it relates to intent.

I am a little surprised at your position since you told them they would be getting the entire charge in the summation, but seeking your own counsel, I am sure I will reiterate to them that they must regard my charge as a whole. I will give them just these pieces but rereiterate [sic] to them they need to keep in mind my charge as a whole.

All right.

MR. HANNA: Yes, your Honor.

THE COURT: We'll see you at 9:15 tomorrow morning, make sure we have agreed to what they'll get.

MR. GARRETT: All right, your Honor.

MR. HANNA: All right.

(5:10 p.m.)

* * *

Supplemental Jury Instructions Regarding Intent

[Tr. 354] (The jury commenced their deliberations at 10:30 a.m.)

THE CLERK: All rise.

THE COURT: Good morning, everybody.

Please be seated.

Good morning. The jurors are all finally here. Apparently the weather kept some of them from getting here on time.

We will bring the jury in and respond to this note that says, "Need a copy of the law stated by Judge on intent."

The way I intend to respond to it, as I mentioned yesterday, is to read to them relevant portions of the charge relating to intent. It strikes me what is responsive to this request is the part of the charge that begins at the bottom of Page 17, "knowing and intentional conduct" generally through the first third of Page 19 ending where we start with Count 1.

I will read to them again from the first full paragraph, beginning with the first full paragraph on Page 31 down through the defense theory of the case all the way through to the end of that paragraph that ends about six lines down on Page 34.

What I intend to do there is to give the jury some context. I will read to them the general instructions regarding intent. Then I will tell them, in connection with Counts 7, 9, and 11 there were four elements the government [Tr. 355] must prove, the second of which is intent to cause death or serious bodily harm. I will give them some context and then I will read that part of the charge.

MR. HANNA: Your Honor, I want to be sure. You had asked me to prepare what I thought was responsive, and I have prepared exactly the same thing that the Court

had focused on except I am not quite sure about where we end on Page 34.

I had included all of Page 34. At the end of that, " . . . you find serious bodily harm . . . ," " . . . bodily harm . . . " and going down to "proof of intent to cause bodily harm is insufficient." I think that is responsive.

THE COURT: Yes. I think you are one draft behind me because I made changes based on the charge conference. I intend to end with the sentence "proof of intent to cause bodily harm is insufficient," after the changes that were made in the charge conference.

MR. HANNA: Okay. The copies that I had made, your Honor, are from the actual final charge. I would ask that the Court respond, as well as reading, but respond to the instruction, or the request, and actually give them a copy of the charge to take into the jury room after you are done charging them.

THE COURT: I will give them the entire charge or I will read them the portions of the charge and encourage them to take the charge as a whole. I am not going to send in, in [Tr. 356] written form, part of the charge.

I understood you to object to sending them the whole charge. That's why I am proceeding the way I intend to do now. I am afraid by sending, in written form, just part of it, I will undercut the bedrock principle that they should view all my instructions as a whole.

MR. HANNA: We would respectfully object to this, request that you send in the charge.

THE COURT: All right. Your request is denied.

Bring in the jury.

THE CLERK: All rise.

(11:30 – jury entered the courtroom).

THE COURT: Please be seated, everyone. Good morning, ladies and gentlemen. Everybody made it in okay eventually.

All right. At the end of the day yesterday, I received from you what's been marked as Jury Note 1: "Need a copy of the law as stated by the Judge on intent."

What I will do now is read to you the portions of the charge I gave you yesterday that relate to intent. There are two segments of the charge that respond to your note.

Let me remind you at the outset that although I intend to do that, let me remind you not to single out any one instruction, these ones included relating to intent, as alone stating the law. Rather, you should consider my instructions [Tr. 357] a whole when you deliberate.

Now I instructed you regarding intent in two respects. First, regarding knowledge, and intent generally as opposed to in the context of the particular counts. Let me reread to you my instructions regarding knowledge and intent generally.

As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes that have been charged to you, I have on occasion explained, before you can find the defendant guilty you must be satisfied that he was acting knowingly and intentionally.

Let me explain what those terms mean under the law.

A person acts knowingly if he acts purposely and voluntarily and not because of a mistake or accident or some other innocent reason. A person acts intentionally if he acts willfully with the specific intent to do something the law forbids.

Now the person need not be aware of the specific law or rule that his conduct may be violating, but he must act with a specific intent do whatever it is the law forbids.

These issues of knowledge and intent require you to make a determination about a defendant's state of mind, something that can rarely be proved directly. A wise and careful consideration of all the circumstances, including the [Tr. 358] defendant's actions and omissions, may permit you to make a determination as to a defendant's state of mind. Indeed, in your everyday affairs, you are frequently called upon to determine a person's state of mind from his words and actions and unique circumstances. You are asked to do the same thing here.

Now, I also charged you regarding intent in connection with the specific crimes charged in 7, 9, and 11. Those are the offenses charging the taking of a motor vehicle by force, violence, or intimidation.

Just to give you a little bit context, I instructed that there were four elements that must be proved by the government beyond a reasonable doubt before you may find the defendant guilty of any of those crimes.

Those elements are as follows.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant, at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

And lastly, that the motor vehicle taken was transported, shipped, or received in interstate commerce.

Now, it strikes us responsive to your note regarding intent are the instructions regarding the second element, [Tr. 359] element of intent. I will reread those to you now.

The second element the government must prove beyond a reasonable doubt is that the taking of a motor vehicle was committed with the intent to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question.

I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you. The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done wilfully with the purpose to do something the law forbids. In this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory in the case that the evidence fails to prove that he acted with indent [sic] to cause death or serious bodily harm. If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious

bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all elements of the offense, [Tr. 360] including this element of intent. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or serious bodily harm at the time of the offense you are considering.

Evidence that the defendant intended to use a gun to frighten the victim is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden. You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or the lack of evidence on the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense. If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious body injury [Tr. 361] that is not sufficient. You

must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

I remind you must consider each count separately.

Serious bodily harm is defined to be bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of a bodily member, organ, or mental faculty. This is to be distinguished from mere bodily harm, which means, cut, abrasion, bruise, burn, disfigurement or physical pain or any other injury to the body no matter how temporary. Proof of intent to cause bodily harm is insufficient.

Those are my instructions to you regarding intent. Hopefully, that answers your question.

Let me ask you to return to the jury room and resume your deliberations.

THE CLERK: All rise.

(10:45 a.m. – July deliberations resume.)

THE COURT: Please be seated.

(Court in recess awaiting the verdict of the jury.)

UNITED STATES OF AMERICA, – against – FRANCOIS HOLLOWAY, also known as "Abdu Ali," Defendant.

95-CR-0078 (JG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

921 F. Supp. 155; 1996 U.S. Dist. LEXIS 4905

April 5, 1996, Dated

COUNSEL: APPEARANCES:

ZACHARY W. CARTER, United States Attorney, Brooklyn, New York, By: Dolan L. Garrett, Assistant U.S. Attorney.

DANA HANNA, ESQ., Brooklyn, New York, Attorney for Defendant.

JUDGES: JOHN GLEESON, United States District Judge

OPINIONBY [sic]: JOHN GLEESON

OPINION: MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Defendant Francois Holloway, also known as "Abdu Ali," was indicted on February 2, 1995. He was charged with conspiring to operate a "chop shop," in violation of 18 U.S.C. § 371, operating a chop shop, in violation of 18 U.S.C. § 2322, three counts of carjacking, in violation of 18 U.S.C. § 2119, and three counts of using and carrying a firearm during and in relation to the charged carjackings, in violation of 18 U.S.C. § 924(c). A jury trial was held in December 1995, after which Ali was found guilty of all charges.

Ali now moves for a new trial pursuant to Fed. R. Civ. P. 33, claiming that such relief is required in the

interest of justice. In the alternative, he seeks reconsideration of his unsuccessful motion pursuant to Fed. R. Cr. P. 29, which he made at trial. The issue raised by the motion was also the central issue at the trial: what must the government prove to satisfy the intent element of the carjacking statute, 18 U.S.C. § 2119?[1]

There is no question that the conduct at issue in this case is precisely what Congress and the general public would describe as carjacking, and that Congress intended to prohibit it in § 2119. However, carelessness in the legislative process has produced a criminal statute that says something fundamentally different than what Congress obviously meant to say. As a result, Ali advances a colorable claim that his conduct here – using a gun to terrorize motorists into giving up their cars – is no longer prohibited by the carjacking statute. Indeed, it is likely that a 1994 amendment to the statute, which was explicitly intended to broaden the available penalties, in fact placed a large number of "carjackers" beyond its reach.

Ali, however, is not among them. Though colorable, his argument fails for the reasons set forth below, and his motion is denied.

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[1] Although Ali's motion purports to address all of the charges against him, none of his arguments addresses Counts One or Two (conspiracy to operate a chop shop and operation of a chop shop, respectively). Even if the challenges raised on this motion had merit, there would be no reason to set aside the jury's verdicts on those counts.

A. The Facts

Vernon Lennon's father, Teddy Arnold, operated a "chop shop" in Queens, New York. Lennon stole cars for his father to chop. His father would tell him what year and model cars he needed, and Lennon would locate such cars and steal them. He did not know how to disable alarms or "hot wire" cars, so Lennon's modus operandi was to take the cars from their owners at gunpoint. Lennon was a team player, always taking another robber with him to help locate the target car and steal it. Since Lennon liked to follow a targeted car, often to the driver's home, before committing the robbery, a teammate was a virtual necessity; if the robbery was successful, there were two cars that had to be driven away.

Lennon has known the defendant Ali (whom Lennon knows as Francois Holloway) since they were boys. In approximately September 1994, he recruited Ali, who would hang around the chop shop, to steal cars with him. Lennon told Ali that Lennon would use a gun to steal the cars, and showed him the gun, a .32 caliber revolver. Ali agreed to help for a fixed fee per car stolen.

On October 14, 1994, Lennon and Ali stole a 1992 Nissan Maxima. They followed the car to the home of its driver, 69 year-old Stanley Metzger, in Queens. As Metzger got out of his car, Lennon and Ali got out of theirs. Lennon approached Metzger, pointed the gun at him, and demanded the keys. Metzger was apparently not fast enough in complying, so Lennon threatened to shoot him. Metzger handed over the keys, and was then told to hand over his wallet. He did so, and the robbers drove off with his car and his money.

On the next day, October 15, 1994, at approximately 8:00 p.m., Lennon and Ali spotted Donna DiFranco driving a 1991 Toyota Celica at the Whitestone Shopping Center in Queens. They followed her to her friend's house, and Lennon approached her after she exited her parked car. He pointed a gun at her and demanded her money and her car keys. She complied, and after some fumbling with the car alarm and an anti-theft device, Lennon and Ali took her car.

At approximately 10:00 p.m. on the same day, Lennon and Ali stole another car, a 1988 Mercedes Benz. They followed the victim, Ruben Rodriguez, to his home in the Jamaica Estates section of Queens. Both robbers got out of their car and approached Rodriguez, who had just stepped out of the Mercedes Benz. Lennon asked Rodriguez if he knew the location of a particular address. The address was, as Rodriguez put it, "way off base," and he knew "something was up." Rodriguez got back into his car and closed the door. Lennon pulled the gun and told him to get out of the car or he would be shot. Rodriguez got out of his car, and Lennon demanded his money as well as the keys. Rodriguez hesitated; his money was in a clutch bag on the passenger's seat, and he felt he might be killed if he leaned into the car to get it. Frustrated by the delay, the defendant Ali punched Rodriguez in the face. Rodriguez reeled backwards from the punch and used that momentum to begin running away from the robbers, who fled with his car and his money.

On all three occasions,[2] Lennon and Ali intended to leave the victims unharmed. Lennon never fired the gun in any of the carjackings. An experienced criminal, he knew that if he did, he risked a lengthier prison term than he would receive for simply robbing the car. For each robbery, the plan was to use the firearm only to obtain possession of the car, not to shoot or otherwise harm the victim.

However, in all three of the charged carjackings, Lennon was prepared to shoot the victims if their resistance made that necessary. In other words, he intended to kill or seriously injure the victims, but that intent was conditioned on their giving the robbers "a hard time." There was ample evidence from which a rational juror could infer that the defendant Ali shared that conditional intent.

B. The Carjacking Statute And Its 1994 Amendment

In September 1992, Paula Basu, a Maryland woman, had her car stolen from her by two men. The men forced her from her car and drove off. Because her infant daughter was in the car, Basu clung to it as the men drove away, and was dragged to her death.

This horrific offense generated a public outcry, and focused attention on legislative efforts to make car robberies a federal crime. Those efforts resulted in the Anti

[2] There was also evidence of two uncharged crimes committed by Ali with Lennon: one other successful carjacking and an attempted one that was aborted by the arrival of a police officer on the scene.

Car Theft Act of 1992, codified at 18 U.S.C. § 2119. As initially enacted, this new federal offense read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The subsections of the statute obviously related solely to punishment, and were not elements of the offense. They provided for enhanced penalties of up to 25 years if serious bodily injury resulted from the offense, and up to life in prison if it resulted in death.

During 1993, Congress was considering extensive new criminal legislation, which included an array of new death penalties. Members of both houses proposed amendments to the newly-minted carjacking statute. The Senate bill proposed an amendment that would provide for the death penalty in cases where a carjacking results in death. S. 942, 103d Cong., 1st Sess. (1993). Senator Lieberman proposed a further amendment to this death penalty provision that would eliminate the requirement that such cases involve the use a firearm by the carjacker.

In his remarks in support of his proposed amendment, Senator Lieberman observed:

> If a carjacking occurs and a death occurs as a result of that, does it really matter whether a firearm was used, whether a knife was used, whether physical force was used, or whether a mother, as in the Basu case, was dragged to her death because she wanted to make every effort to save the life of her child?
>
> . . .
>
> In this case, the very bill I am amending has the death penalty for carjacking. All I am doing here is taking a small but I think significant additional step in saying, if the death penalty is going to be enacted into law for cases of carjacking where death occurs, then we ought not to require that that death has to involve a firearm. If the person in a carjacking is killed as a result of a knife or other weapon or just as a result of the carjacking, then the criminal ought to be subject to death himself. That is why I propose the amendment.

139 Cong. Rec. S15295, S15301, S15303 (1993) (statement of Sen. Lieberman).

Thus, with respect to carjackings resulting in death, the Senate bill eliminated the firearm requirement and provided for the death penalty. Because such a statute could authorize the death penalty for an accomplice who neither killed a victim nor intended to kill or harm the victim, it would have been subject to attack under the Eighth Amendment. See Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). Perhaps for that reason, the conference report for the bill modified the

Senate death penalty amendment for carjacking by adding an intent requirement – the "intent to cause death or serious bodily harm." H.R. Rep. No. 103-694, 103d Cong., 2d Sess. (1994).

These combined efforts resulted in the following provision of the Violent Crime Control and Law Enforcement Act of 1994:

> (14) CARJACKING – Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm."

Violent Crime Control and Law Enforcement Act of 1994 (the "Act"), Pub L. No. 103-322, Title VI, § 60003(a)(14), 108 Stat. 1796, 1970 (1994). The provision was intended to affect only carjackings resulting in death. That was the sole focus of the legislative debates. Moreover, the provision was included in Title VI of the Act, which was entitled the "Federal Death Penalty Act of 1994." The most powerful evidence of the limited purpose of the amendment is Congress' obvious belief that it was amending only a penalty enhancement provision, not the statutory prohibition itself. Specifically, it purported to amend "§ 2119(3)," the subsection of the original (and existing) statute that is solely a penalty provision. Indeed, it is the penalty provision applicable to cases in which death results, which cases were, as noted, the only focus of the legislature's attention.

However, the possession-of-a-firearm requirement that the amendment eliminated was not, as the amendment mistakenly assumed, located in 2119(3). In fact, it was not in any of the three penalty provisions; rather, it was an element of the offense itself, a necessary ingredient of all carjacking prosecutions, not just those resulting in death. Thus, in its effort to eliminate the firearm requirement only in cases resulting in death, Congress enacted an amendment that, on its face, eliminates it in all cases.[3]

Similarly, Congress intended to add a new intent element for cases in which the death penalty is sought. However, notwithstanding the amendment's stated intention to affect only the penalty provisions of § 2119(3), it added the new element – "the intent to cause death or serious bodily harm" – to the first clause of § 2119, and thus made it applicable to all violations of the statute.

As amended, the statute now reads as follows:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce

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[3] It has been suggested that, notwithstanding the unequivocal language of the amended statute, the firearm requirement has only been eliminated when the carjacking results in death, and still must be proved in cases, like this one, that fall within § 2119(a) or (b). M. Michenfelder, The Federal Carjacking Statute: To Be Or Not To Be? An Analysis Of The Propriety Of 18 U.S.C. § 2119, 39 St. Louis U.L.J. 1009 (1995). Perhaps because a firearm was used in this case, however, that strained argument has not been made here, and thus its merits need not be addressed.

from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

In short, the 1994 amendment to the carjacking statute effected fundamental changes that Congress never intended. The elimination of the firearm requirement for all cases federalized approximately 14,000 additional cases each year.[4] At the same time that it inadvertently opened the door for all these cases, Congress inadvertently closed it substantially by unintentionally imposing the specific intent requirement on the entire statute, not just in death penalty cases.[5]

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[4] See Michenfelder, supra note 3, at 1012-13 (35,000 carjackings or attempted carjackings were committed during each of the years 1987-92, and firearms were used 50% of the time).

[5] The government does not contend, as it might have, that the specific intent required by the 1994 amendment is an element only in carjacking cases where death results and the death penalty is sought. For that reason and because I conclude Ali had the specific intent required by the statute in any event, I do not need to address that issue.

C. Discussion

Ali urges a literal construction of the amended statute, contending that it prohibits only those carjackings in which the perpetrators unconditionally intend to kill or seriously injure their victims. Under this reading, the law would not prohibit the crimes committed by Ali and Lennon, where the intent of the carjackers was not to kill or injure people, but to get cars. Indeed, this reading would no doubt insulate from federal prosecution the large majority of carjackings, as carjackers generally do not intend to cause death or serious bodily injury, but in fact hope that the opposite will occur, i.e., that the victim will peaceably give up the car and suffer no harm at all.

Thus, if accepted, Ali's construction of the carjacking statute would drastically narrow its scope. Only those carjackers who intend not only to rob cars, but also to murder or seriously injure another, could be prosecuted. A person who intends to find a Mercedes Benz, shoot the owner and take the car could be prosecuted. A person who intends to find a Mercedes Benz and shoot the owner only if she refuses to give up her car could not, at least if the plan succeeds and the car is taken without the need to fire.

This would be an odd result. The statute would no longer prohibit the very crime it was enacted to address except in those unusual circumstances when carjackers also intended to commit another crime – murder or a serious assault. Moreover, this result, if accepted, would be the ironic product of legislation that was intended "to broaden and strengthen [the carjacking statute] so our U.S. attorneys (sic) have every possible tool available to

them to attack the problem." 139 Cong. Rec. S15295, S15301 (1993) (statement of Sen. Lieberman).

Ali's argument fails because his intent to aid and abet Lennon's use of the firearm if the victims resisted is sufficient. Where a crime is defined to require a particular intention, that element is satisfied even if the requisite intent is conditional, unless the condition negatives the evil sought to be prevented by the statute. W. R. Lafave and A. W. Scott, Jr., Handbook on Criminal Law, § 28 at 200 (1972):

Although the issue of conditional intent is not raised very often, at least in the federal courts, it is not new. In People v. Connors, 253 Ill. 266, 97 N.E. 643 (Ill. 1912), the defendants held guns to members of a rival labor union and told them to take off their overalls or they would be shot. Although the workers complied, and there was no shooting, the defendants were convicted of assault with an intent to murder. 253 Ill. at 273. In upholding the conviction, the Supreme Court of Illinois held that the crime is "complete where it is shown that the assailant, with the present ability to destroy life or do great bodily harm, draws a dangerous weapon on another and threatens to kill him unless the party assailed complies immediately with some unlawful condition or demand. . . . The offense is complete even though commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him." Id. at 647-48.

Some conditions on intent may bring the conduct out of the reach of the statute. In Hairston v. Mississippi, 54

Miss. 689 (1877), Hairston attempted to remove the personal effects of a laborer from a plantation. When the plantation owner grabbed Hairston's mules to prevent him from removing the property, Hairston pointed a pistol at him and angrily threatened to " 'shoot any G-d d – d man who attempts to stop my mules.' " Id. at 692. The plantation owner released the mules, and Hairston was convicted of assaulting him with intent to murder. The Supreme Court of Mississippi reversed the conviction. Because the plantation owner was trespassing on Hairston's property by grabbing his mules, the threat to shoot was conditioned on a demand Hairston had a right to make, and thus he could not be guilty of the offense.

Here, of course, there can be no doubt that the intent to shoot the victims was conditioned on a demand – that they turn over their cars – that Lennon and Ali had no right to make.

Not all instances of conditional intent involve demands by the defendant. A person may break into a house intending to rape its occupant if she is home, or to steal from it only if no one is home. Section 2.02(6) of the Model Penal Code provides as follows:

Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

See also United States v. Arrellano, 812 F.2d 1209, 1212 n.2 (9th Cir. 1987).

Viewed under this standard, the conditional nature of Ali's intent obviously does not help him. The evil sought to be prevented by § 2119 is not "negatived" by the condition, it is the condition. Section 2119 is not a murder or assault statute, it is a car robbery statute.

Ali's argument on this motion relies in part on the premise that there was insufficient evidence from which a juror could find an intent on his part that recalcitrant victims be shot. However, as stated above, there was ample evidence from which a jury could infer that intent. Lennon told Ali that a gun would be used and showed him the gun. Lennon intended to shoot uncooperative victims, and threatened to do so in Ali's presence. Ali himself demonstrated a seriousness of purpose by punching one of the victims in the face simply because he hesitated in handing over his money. Ali makes much of the fact that there is no direct evidence of his intent, but there rarely is such evidence. The jury could readily have inferred it from the circumstances, and Ali thus cannot satisfy his heavy burden of establishing the insufficiency of the evidence.

Finally, Ali's reliance on the rule of lenity is misplaced. Whether conditional intent is sufficient to establish the intent element of the carjacking offense is not a question of statutory construction, but of criminal law.

The jury instructions on the element of intent in the carjacking counts included the following:

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a

certain event occurs. In this case, the government contends that the defendant intended to cause death or seriously bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied. I remind you that you must consider each count separately.

In view of the foregoing, those instructions, and the charge as a whole, properly permitted the jury, if it accepted the government's evidence, to find Ali guilty of carjacking.

D. Conclusion

It is likely that many incidents of what both Congress and the general public would call carjacking are no longer prohibited by § 2119. Without doubt, some car robbers threaten death or serious bodily injury, but intend to flee the scene rather than escalate the confrontation if the demand for the car is rebuffed. A defendant with that state of mind may not be subject to prosecution under § 2119, even if the threat succeeds and he robs the car.

However, because Ali had the specific intent required by the statute, albeit conditionally, his motion to set aside the verdicts and for a new trial is denied.

So Ordered.

JOHN GLEESON, U.S.D.J

Dated: Brooklyn, New York
April 5, 1996

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1877 – August Term, 1996

(Argued June 25, 1997 Decided September 16, 1997)

Docket No. 96-1563

UNITED STATES OF AMERICA,

Appellee,

- v. -

TEDDY ARNOLD; CHARLES ROBINSON; DARREL [SIC] JONES; DAVID VALENTINE; PAUL SCAGLIONE; and JEFFREY DRAKE

Defendants,

FRANCOIS HOLLOWAY/a/k/a ABDU ALI

Defendant-Appellant.

Before:

MCLAUGHLIN and MINER, *Circuit Judges,*
and SCULLIN, *District Judge.*[1]

Appeal from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.) convicting defendant, following a jury trial, of conspiracy to operate a "chop shop," operation of a

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[1] The Honorable Frederick J. Scullin, Jr. of the United States District Court for the Northern District of New York, sitting by designation.

chop shop, three counts of carjacking, and three counts of using a firearm in the commission of a crime of violence.

Affirmed.

Judge Miner dissents in a separate opinion.

KEVIN J. KEATING, Esq., Law Office of Kevin J. Keating, Garden City, New York, *for Defendant-Appellant.*

DOLAN L. GARRETT, Assistant United States Attorney, Brooklyn, New York (Zachary W. Carter, United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee.*

SCULLIN, *District Judge:*

Defendant-Appellant Francois Holloway appeals from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.), following a jury trial, convicting Holloway of numerous offenses connected with his participation in several carjackings in Queens, New York. Holloway was convicted of one count of conspiracy to operate a "chop shop" in violation of 18 U.S.C. § 371 (count one); one count of operating a chop shop in violation of 18 U.S.C. § 2322 (count two); three counts of carjacking in violation of 18 U.S.C. § 2119 (counts seven, nine, and eleven); and three counts of using a firearm in the commission of a crime of violence in violation of 18 U.S.C. § 924(c) (counts eight, ten, and twelve). Holloway was sentenced to 60 months

on count one; 151 months on count two, to run concurrently with count one; 151 months on each of counts seven, nine, and eleven, to run concurrently with each other and counts one and two; 5 years on count eight, to run consecutively; and 20 years each on count ten and count twelve, each to run consecutively. Defendant was also sentenced to terms of supervised release and a special assessment of $400.

On appeal, Holloway contends that: (1) the district court erroneously charged the jury on the intent element of the carjacking statute; (2) his trial counsel rendered constitutionally ineffective assistance; and (3) the trial court improperly imposed consecutive sentences pursuant to Holloway's firearm convictions.

BACKGROUND

Holloway's conviction stems from his involvement in a "chop shop" operation located at 115th Drive in Queens, New York. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to begin stealing cars to be taken to the chop shop for dismantling. Lennon, in turn, recruited two individuals, David Valentine and Holloway, to assist him in his car thefts. The co-conspirators agreed that they should use a firearm during their thefts, and Lennon showed both Valentine and Holloway a .32 caliber revolver he intended to use for that purpose.

The first charged carjacking involving Holloway and Lennon occurred in October 1994. On October 14, Holloway and Lennon followed a 1992 Nissan Maxima driven by sixty-nine year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon

approached Metzger and pointed his revolver at him, demanding his car keys. At first, Metzger gave his house keys to Lennon, who rejected them and demanded his car keys. Metzger testified that Lennon told him, "I have a gun. I am going to shoot." Thereafter, Metzger surrendered his keys and also his money, and Lennon drove away in the Maxima.

The following day, Lennon and Holloway followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, leveled his gun at her, and demanded her money and her car keys. After DiFranco disengaged the car alarm and unlocked her "club" securing the steering wheel, Lennon drove off in her car.

That same day, Holloway and Lennon followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until he parked near his home at Jamaica Estates. Both Lennon and Holloway approached the driver this time. Rodriguez, sensing something was wrong, retreated to his car. Lennon produced his gun and threatened, "Get out of the car or I'll shoot." Rodriguez complied and Lennon demanded his money and car keys. When Rodriguez hesitated, Holloway punched him in the face. Rodriguez surrendered the items and fled on foot, yelling for help. Lennon drove off in the Mercedes, and Holloway followed in another car.

At trial, the Government also presented evidence of two additional uncharged carjackings involving Lennon and Holloway. One involved the theft of a 1987 Nissan Maxima which was stolen from Betty Eng as she parked in her driveway on October 12, 1994. The other

uncharged carjacking occurred on October 19, 1994. On that day, Holloway and Lennon attempted to steal a 1994 Nissan Sentra from Sara Markett when she parked her car on 193rd Street in Queens. Lennon threatened Markett, telling her, "Give me your keys or I will shoot you right now." Thereafter, Markett surrendered her keys and ran screaming into a nearby hair salon. The theft was foiled by an off-duty police officer, Adam Lamboy, who happened to be in the hair salon at that time. Upon seeing Lennon in Markett's car, Lamboy yelled, "Police, don't move." Lennon made a motion toward his waist band prompting Lamboy to draw his weapon. Lennon then fled to a red Toyota driven by Holloway, and the two escaped.

On November 22, 1994, two of the carjacking victims, Ruben Rodriguez and Sara Markett, identified Holloway as one of the carjackers in a police line-up. Following his identification, Holloway confessed to the police that he had participated with Lennon in three carjackings involving a silver Mercedes-Benz, a black Nissan Maxima, and a gray Nissan. Immediately prior to trial, Lennon pled guilty to several carjacking charges and eight automatic teller machine ("ATM") robberies. Thereafter, Lennon testified at trial as a government witness. Lennon testified as to the events set forth in the above carjackings, as well as seven additional carjackings in which he participated with Valentine. Lennon testified that his plan was to steal the victims' cars without harming the victims; however, Lennon also testified that he would have used the gun if one of the victims had given him "a hard time" or had resisted.

The Government also presented testimony at trial from Rodriguez, Metzger, DiFranco, Eng, and Lamboy. These witnesses presented factually consistent testimony depicting the various carjackings as set forth above. With the exception of Rodriguez, none of the victims was injured during the course of the carjackings, and Rodriguez did not require medical attention.

The defense declined to call any witnesses. Over the objection of defense counsel, Judge Gleeson charged the jury on the doctrine of conditional intent, as it applied to the intent element for the carjacking offenses. Judge Gleeson instructed the jury that an intent to cause death or serious bodily harm conditioned on whether the victims surrendered their cars was sufficient to satisfy the specific intent requirement of the statute. As stated, the jury found Holloway guilty on all eight counts charged in the indictment.

Following the verdict, Holloway moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, for reconsideration of his unsuccessful Rule 29 motion. *See United States v. Holloway*, 921 F. Supp. 155, 156 (E.D.N.Y. 1996). Holloway argued that the Court erred in charging the jury on conditional intent in light of the carjacking statute's unambiguous specific intent requirement, which requires a carjacker to have the intent to cause death or serious bodily harm in order to be culpable.

In a decision issued on April 5, 1996, Judge Gleeson denied Holloway's post-trial motion. On August 16, 1996, Holloway was sentenced, and, on August 28, 1996, judgment of conviction was entered. This appeal followed.

DISCUSSION

Holloway raises three issues on appeal: (1) whether Judge Gleeson erred in instructing the jury on "conditional intent"; (2) whether the performance of Holloway's trial counsel was constitutionally deficient so as to require reversal and a new trial; and (3) whether Judge Gleeson abused his discretion by sentencing Holloway to consecutive sentences pursuant to 18 U.S.C. § 924(c).

I. *Conditional Intent Instruction*

Holloway maintains that Judge Gleeson committed reversible error by charging the jury on the doctrine of "conditional intent." Holloway contends that: (1) the federal carjacking statute clearly and unambiguously requires that a defendant possess a specific intent to cause death or serious bodily harm (hereinafter "specific intent to kill"), and (2) conditional intent, by definition, does not satisfy this requirement.

A. 1994 Amendments to the Carjacking Statute

Holloway argues that the statute, as amended, is clear and unambiguous on its face, thus preventing the trial court, or this Court for that matter, from inquiring into the intent of Congress or ascribing some alternate construction of the statute based on any perceived error in drafting. *See Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981)

Prior to the 1994 Amendments, the federal carjacking statute, 18 U.S.C. § 2119, read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Violent Crime Control and Law Enforcement Act of 1994 amended this statute in the following manner:

> (14) CARJACKING. – Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm".

Pub. L. 103-322, § 60003(a)(14). With these revisions, the statute now reads:

> Whoever, *with the intent to cause death or serious bodily harm* takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence

of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, *or sentenced to death.*

18 U.S.C. § 2119 (1997) (emphasis added).

The amendments to the carjacking statute contained in the Violent Crime Control and Enforcement Law Act of 1994 came about as an attempt to expand the number of federal crimes subject to the death penalty. *See* 140 Cong. Rec. E857-03 (statement of Rep. Franks); 140 Cong. Rec. S12421-01, S12458 (statement of Sen. Nunn); 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman). The thrust of the various early versions of the amendments was to add the death penalty as a sentencing option when death resulted from a carjacking, and also, in some versions, to eliminate the firearm requirement. *See* H.R. 4197, 103d Cong. § 125(h) (1994) (removed firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 203(a)(15) (1993) (version as of October 19, 1993 removed the firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 703(e) (1994) (version as of

April 21, 1994 added the death penalty only). Congressional opposition to the amendments coalesced into two camps: those who opposed the death penalty in general, and those who opposed the expansion of federal criminal jurisdiction. *See* 140 Cong. Rec. S12309-02, S12311 (statement of Sen. Leahy contained in Conference Report on H.R. 3355); 140 Cong. Rec. H2322-02, H2325 (statement by Rep. Glickman on amendment introduced by Rep. Scott to remove the death penalty addition to the Violent Crime Control Act).

The insertion of the heightened intent requirement at issue here occurred at a relatively late stage in the legislative process – while the Act was under consideration in Conference Committee in the summer of 1994. *See* 140 Cong. Rec. H8772-03, H8819, H8872 (Conference Report on H.R. 3355 dated August 21, 1994). On September 13, 1994, the Act was signed into law. There is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement. However, it is clear from a review of legislative history that Congress intended to broaden the coverage of the federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking categories was, in all likelihood, an unintended drafting error. *See* 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman) ("This amendment will broaden and strengthen that law so our U.S. attorneys have every possible tool available to them to attack the problem."); 140 Cong. Rec. E857-03, E858 (extension of remarks by Rep. Franks) ("We must send a message to the criminal that committing a violent crime will carry a severe penalty. This legislation will make an

additional 22 crimes including carjacking and drive-by shootings, subject to the death penalty.").

At least two courts have speculated that Congress probably intended the heightened intent requirement to apply only to cases where the carjacking resulted in death, that is, those cases falling under § 2119(3). *See United States v. Anderson*, 108 F.3d 478, 482-83 (3d Cir. 1997), *petition for cert. filed* (U.S., June 3, 1997) (No. 96-9338); *Holloway*, 921 F. Supp. at 158. *But see United States v. Randolph*, 93 F.3d 656, 660-61 (9th Cir. 1996). In support of this interpretation, these courts point to the initial wording of the 1994 amendment, *"Section 2119(3) of title 18, United States Code, is amended by. . . ."* as limiting language for the two specific changes set forth within. *See Anderson*, 108 F.3d at 478-79 (quoting Pub. L. No. 103-322, § 60003(a)(14)) (emphasis added); *see also Holloway*, 921 F. Supp. at 158.

Regardless of the actual intent of Congress in adding this amendment, the practical effect of adding this requirement is to severely limit the scope of conduct covered by the statute. The addition of the heightened intent requirement into the body of the carjacking statute limits federal jurisdiction over all carjacking offenses to only those in which death or serious bodily harm was intended. Notwithstanding that such a result was unintended, the Court declines any invitation to redraft the statute – that is a task better left to the legislature.[2] Thus,

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[2] We note that since the 1994 amendments there have been several legislative initiatives introduced in Congress that seek to remove the intent portion of the carjacking statute. *See* The Violent Crime Control and Law Enforcement Act of 1995, S. 3, 104th Cong. § 717 (1995) (titled "Elimination of Unjustified Scienter Element for Carjacking"); Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807 (1997) (titled "Elimination of Unjustified Scienter Element for Carjacking").

the sole issue this Court must decide is whether the "specific intent to kill," as now reflected in 18 U.S.C. § 2119, encompasses a conditional intent, as defined by Judge Gleeson in his instruction to the jury.

B. Judge Gleeson's Instruction

In his instruction to the jury, Judge Gleeson charged, in relevant part:

> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Holloway argues that the above instruction was erroneous because it allowed the jury to convict him based on lesser mental state than is required by the carjacking statute. Holloway contends that the plain meaning of "specific intent to kill" does not include the lesser mental state of "conditional intent," because a conditional intent to kill is no more than a state of mind where death is a foreseeable event and, as such, is equivalent to a mental state of recklessness or depraved indifference. Holloway contends that such a lesser mental state plainly does not satisfy the intent requirement of the carjacking statute.[3]

The Court agrees that a conditional intent to cause death or serious bodily harm and "reckless indifference" both involve foreseeability; however, conditional intent requires a much more culpable mental state. A carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged in willful and deliberate consideration of his actions. Under these circumstances, death is more than merely foreseeable, it is fully contemplated and planned for. Such a mental state is clearly distinguishable from the

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[3] Holloway cites to Second Circuit precedent which holds that proof of a reckless or wanton state of mind cannot constitute a specific intent to kill. *See, e.g., United States v. Kwong*, 14 F.3d 189, 194-95 (2d Cir. 1994).

characterization of conditional intent advanced by Holloway, which only has the carjacker *aware* of a *risk* of death of which he chooses to disregard.

Holloway further argues that the Supreme Court case, *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987), forecloses the inclusion of conditional intent within the scope of an ordinary specific intent to kill. In *Tison*, co-defendants Raymond and Ricky Tison planned an armed jail break to free their father, Gary Tison, and another inmate from the Arizona State Prison. *Id.* at 139. After a successful escape from prison, a flat tire in their getaway car led to the stopping and theft of a family's car in the desert outside of Flagstaff, Arizona. *See id.* at 140. The defendants witnessed their father brutally execute the family who had been in the car. *See id.* at 141. The defendants were found guilty of aggravated felony-murder and sentenced to death. *See id.* at 142. In the context of reviewing a collateral attack on the imposition of the death penalty, the Supreme Court found that under the factual circumstances presented, the defendants lacked a "specific intent to kill," and at most had a culpable mental state of reckless indifference to human life. *Id.* at 152. Holloway seizes on this language, characterizing conditional intent as an analogous mental state to that ascribed to the defendants in *Tison*. Holloway argues that, at best, the proof shows that he and Lennon shared a conditional intent to kill, which only meant that it was foreseeable that death could result from their various carjackings.

The facts of *Tison* are plainly distinguishable from the case at bar. In *Tison* some violence was foreseeable to the

defendants in effecting the jailbreak, however, the murders for which the defendants were convicted were precipitated by a completely unplanned event, the flat tire in the desert. Thus, while it may have been foreseeable to them that death would occur in the course of the escape, the murders that flowed from their breakdown in the desert were not the result of a willful and deliberate plan.

Furthermore, the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law. In his decision denying Holloway's Rule 33 motion, Judge Gleeson cited to state criminal law authority as support for his conditional intent charge. *See Holloway*, 921 F. Supp. at 159 (citing W.R. LaFave and A.W. Scott, Jr., *Handbook on Criminal Law* § 28 at 200 (1972); Model Penal Code § 2.02(6) (American Law Institute); *People v. Connors*, 253 Ill. 266, 97 N.E. 643 (1912); *Hairston v. Mississippi*, 54 Miss. 689 (1877)). Following his decision, the Third Circuit in *United States v. Anderson* cited to Judge Gleeson's opinion with approval, finding that "conditional intent" was included within the specific intent required by the carjacking statute. 108 F.3d at 483, 485. The *Anderson* court also cited to additional authority confirming this principle of criminal law, including the incorporation of the doctrine of conditional intent into some state penal codes. *See* Del. Code Ann. tit. 11 § 254 (1996) ("The fact that a defendant's intention was conditional is immaterial unless the condition negatives the harm or evil sought to be prevented by the statute defining the offense."); 18 Pa. Cons. Stat. Ann. 18 § 302(f) (West 1997) ("Requirement of intent satisfied if intent is conditional – When a particular intent is an element of an offense, the

element is established although such intent is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."); Haw. Rev. Stat. § 702-209 (1996) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense."); *see also Shaffer v. United States*, 308 F.2d 654, 654-55 (5th Cir. 1962); *People v. Vandelinder*, 481 N.W.2d 787, 788-89, 192 Mich. App. 447 (1992); *Commonwealth v. Richards*, 363 Mass. 299, 293 N.E.2d 854, 860 (1973). *But see State v. Irwin*, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982).

This Court also finds ample persuasive authority supporting the inclusion of conditional intent within the scope of the specific intent requirement. *See People v. Thompson*, 209 P.2d 819, 820 (Cal. Ct. App, 1949); *People v. Henry*, 190 N.E. 361, 361-62 (Ill. 1934); *Johnson v. State*, 605 N.E.2d 762, 765 (Ind. Ct. App. 1992); *Gregory v. State*, 628 P.2d 384, 386 (Okla. Crim. App. 1981); *see also* 40 Am. Jur. 2d Homicide § 571 (1968) ("The question whether an assault accompanied by a threat to kill unless a demand is complied with is an assault with intent to kill or murder has generally been answered in the affirmative. . . . "). Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute. The alternative interpretation would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or

maim the victim. Such an interpretation would dramatically limit the reach of the carjacking statute. "It is well-established that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.' " *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S. Ct. 1549, 1554 (1987)). A statute should not be literally applied if it results in an interpretation clearly at odds with the intent of the drafters. *See id.* While the Court cannot and should not rewrite a poorly drafted statute, it has an obligation to interpret a statute so as to give it reasonable meaning.

After reviewing the substantial body of state law addressing this issue, and the clear legislative purpose of 18 U.S.C. § 2119, the Court finds that an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set forth in the federal carjacking statute.[4] *Accord Anderson*, 108 F.3d at 485. As such, we accept

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[4] The Ninth Circuit seemingly came to the opposite conclusion in *United States v. Randolph*, 93 F.3d 656, 665 (9th Cir. 1996), when it stated, "[t]he mere conditional intent to harm a victim *if* she resists is simply not enough to satisfy § 2119's new specific intent requirement." However, in *Randolph* the only evidence of intent was a threat made by one of the defendants to the victim that " 'she would be okay' if she '[did] what was told of her.' " *Id.* The Ninth Circuit held that "more than a mere threat is required to establish a specific intent to kill or harm." *Id.* We agree with the Ninth Circuit that without more, a mere threat of harm is not sufficient to establish a specific intent to kill. In fact, Judge Gleeson so charged in his jury instruction.

the well-reasoned opinion of the court below, and hold that Judge Gleeson did not err when he instructed the jury on conditional intent.

II. *Ineffective Assistance of Counsel*

Holloway's second ground for appeal is that he received constitutionally ineffective assistance of counsel, requiring the reversal of his conviction and a new trial. Holloway argues that even though his defense counsel relied on a legally sound argument premised on the lack of specific intent, once Judge Gleeson rejected his argument, Holloway's conviction was a foregone conclusion. Holloway argues that his trial counsel should have presented his specific intent defense, while at the same time vigorously contesting the evidence concerning all of the other elements in question.

Claims for ineffective assistance of counsel are analyzed under the framework set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), which requires that a defendant show "(1) that his attorney's performance fell below an 'objective standard of reasonableness,' and (2)

We do, however, disagree with the Ninth Circuit's dicta that equated a threat of harm to conditional intent. *See id.* The court stated, "[the defendant's] threat was tantamount to a conditional intent to harm." *Id.* While a threat is certainly evidence of a conditional intent to harm, conditional intent is not equivalent to a threat, it is much more. Conditional intent implies some indication that the defendant means to make good on his threat to harm. An *idle* threat can never constitute an intent to kill.

that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (quoting *Strickland*, 466 U.S. at 688, 694).

Even if Holloway could establish the first prong of the *Strickland* test, he has not met his burden on the second prong. The trial counsel's "intent" defense was appropriately directed at the most questionable aspect of the Government's case. Trial counsel's strategy to concede the other elements of the offense was reasonable in light of the overwhelming evidence in the case, i.e., Lennon's testimony that Holloway assisted him in the carjackings, several victims' identification of Holloway, and Holloway's own confession. Holloway's assertion that the outcome of the trial would have somehow been different had his trial counsel more vigorously contested this testimony is conclusory and unpersuasive given the record before the Court. As such, Holloway's appeal in this respect lacks merit.

III. *Imposition of Consecutive Sentences*

Finally, Holloway contests the imposition of consecutive sentences on his firearm convictions pursuant to 18 U.S.C. § 924(c). Holloway concedes that this Court has already held in *United States v. Mohammed* that issuing consecutive sentences under the carjacking statute and the firearm statutes based on the same carjacking is constitutionally permissible. 27 F.3d 815, 820-21 (2d Cir. 1994). However, Holloway argues that because the trial court lowered the standard of proof for carjacking by

allowing a verdict based on conditional intent, then the trial court should be precluded from imposing consecutive sentences based on those offenses. The Court finds this argument to be wholly without merit.

CONCLUSION

Based on the foregoing, we affirm the judgment of the district court.

MINER, *Circuit Judge*, dissenting:

Because I perceive no basis in the plain language of the statute or in the legislative history for an element of conditional intent in the crime under examination here, I respectfully dissent.

As originally cast, the carjacking legislation established as a federal crime the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force, violence or intimidation on the part of one possessing a firearm. *See* 18 U.S.C. § 2119 (prior to 1994 Amendment). Enhanced penalties for the infliction of serious bodily injuries or resulting death were provided. *See id.* § 2119(2), (3). The statute after amendment defines the crime as the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force or violence on the part of one who intends to cause death or serious bodily harm. *See id.* (as amended). The penalty if death results is further enhanced to include the death penalty. *See id.* § 2119(3). The distinctions to be made between the

original and the amended statute are clear; the firearm possession requirement is deleted; a specific intent element is added; and the penalty provision is expanded.

Despite the foregoing, my colleagues approve the district court's failure to instruct the jury as the statute requires regarding the specific intent to cause death or serious bodily harm, and further approve the following substituted instruction, which allows for conviction on proof of conditional intent:

> In this case, the government contends that the defendant intended to cause death or serious bodily harm *if the alleged victims had refused to turn over their cars*. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

(Emphasis added.) What is the provenance of such an instruction? It surely is not the language of the statute itself. It is not even the indictment, for the indictment parrots the statute. The district court therefore was wrong in charging the jury that the government had advanced a conditional intent contention.

In arriving at their conclusion, my colleagues first turn to the legislative history and properly note that the amendment to the carjacking statute represented an effort to expand the number of crimes subject to the death penalty, including carjacking where death results. There is also an indication of an intent on the part of Congress to eliminate the firearm requirement. Ultimately, as all agree, the heightened intent requirement was added to

the final amending legislation by the Congressional Conference Committee. There is no discernible information on why or how this element was added.

How, then, can it be said that "it is clear from a review of legislative history that Congress intended to broaden the coverage of the federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking [penalty] categories was, in all likelihood, an unintended drafting error[?]" Maj. Opn. at 86. No member of Congress has ever referred to "an unintended drafting error," and the congressional intent may well have been to narrow in some respects, as well as broaden in some respects, the statute's coverage.

The scienter requirement of the amended statute has been interpreted in different ways. While one circuit court thinks that Congress intended the specific intent provision to apply only where the carjacking resulted in death, *see United States v. Anderson*, 108 F.3d 478, 482 (3d Cir. 1997), another circuit court considers that the purpose of the amendment was to convert the entire general intent offense to a specific intent offense, *see United States v. Randolph*, 93 F.3d 656, 661 (9th Cir. 1996). But we have no authority to correct an "unintentional drafting error" where there is no reason to say that there is an "error" or that the statutory provision inserted is "unintended." By adding a conditional intent element to correct what the court perceives to be an error, we ignore the teaching of the Supreme Court that "[to] supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926), *quoted in West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

We do know that since the enactment of the 1994 amendment to the carjacking statute, Congress has made at least three attempts to eliminate what was termed the "unjustified scienter element for carjacking." Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807; Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong. § 717 ("VCCLEIA"); *see* Anti-Gang and Youth Violence Control Act of 1997, S. 362, 105th Cong. § 2113 ("AGYVCA"). These statutes would eliminate entirely the requirement that the government prove that the defendant possessed the intent to cause death or serious bodily harm. *See, e.g.*, VCCLEIA § 717 ("Section 2119 of title 18, United States Code, is amended by striking ', with the intent to cause death or serious bodily harm'."). It is unclear what happened to the earlier attempts to remove the intent element from § 2119, but the AGYVCA, the most recent effort, presently appears to be before the Senate Judiciary Committee.

The only discussion we have concerning the attempts to remove the intent element comes from Senator Leahy's comments in introducing the AGYVCA. The Senator explained:

> Prior to the enactment of [the Violent Crime Control and Law Enforcement Act], the offense applied only if the defendant possessed a firearm. Section 60003(a)(14) of that law appropriately deleted the firearm requirement, as had been proposed in the Senate-passed bill, but in conference a new scienter element was added that the defendant must have intended to cause death or serious bodily injury. This unique new element will inappropriately make carjackings difficult or impossible to prosecute in certain

> situations. . . . The new requirement . . . will likely be a fertile [source] of argument for defendants in cases in which no immediate threat of injury occurs, such as where a defendant enters an occupied vehicle while it is stopped at a traffic light and physically removes the driver. Even when a weapon is displayed, the defendant may argue that although it was designed to instill fear, he had no intent to harm the victim had the victim in fact declined to leave the car.

143 Cong. Rec. S1659, S1661-62 (Feb. 26, 1997) (statement of Sen. Leahy).

Aside from the fact that Senator Leahy's comments represent the views of only one member of Congress, there is nothing in those comments to indicate that the "scienter element," as he calls it, was not intentionally placed in the statute when the 1994 Amendment was enacted. He is saying only that the element should be taken out. But, so far, his colleagues have not agreed that this should be done.

In this regard, it is of more than passing interest that carjacking is essentially a state offense, and it may well be the intent of Congress to limit the scope of the federal offense. *See generally* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 Syracuse L. Rev. 1127 (1997). Several states have enacted specific carjacking statutes. *See, e.g.*, Fla. Stat. § 812.133 (1994); Md. Code Ann., Crimes and Punishments § 348A (1996); Miss. Code Ann. § 97-3-117 (1994); Va. Code Ann. § 18.2-58.1 (Michie 1996). The common elements of each of these statutes are the taking of a motor vehicle by threat of force or violence. *See, e.g.*, S.C.Code Ann. § 16-3-1075(B) (Law Co-op. Supp.

1996) ("A person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force and violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle."). Some states also have enacted specific armed carjacking statutes to address carjackings in which a dangerous weapon is used. *See, e.g.*, D.C. Code Ann. § 22-2903(b)(1) (1996).

Those states that do not have a specific carjacking statute, such as New York, prosecute carjackings under the state's robbery statute. *See, e.g., Kansas v. Vincent*, 908 P.2d 619, 621 (Kan. 1995) (defendant charged with felony murder, conspiracy to commit robbery and aggravated robbery in relation to a carjacking resulting in death); *New York v. Lee*, 652 N.Y.S.2d 2, 3 (App. Div. 1st Dept.1996) (defendant charged with first degree robbery in the gunpoint theft of a car). As with the specific carjacking statutes, these robbery statutes apply to thefts involving the use of threat or force. *See, e.g.*, N.Y. Penal Law § 160.10(3) (McKinney 1997) ("A person is guilty of robbery in the second degree when he forcibly steals property and when . . . [t]he property consists of a motor vehicle. . . . "). Thus, even where there is no specific carjacking statute, carjackings can be prosecuted adequately under state law.

Ultimately, my colleagues seem to reject the legislative intent approach, saying that "[n]otwithstanding that such a result was unintended, the Court declines any invitation to redraft the statute – that is a task better left to the legislature." Maj. Opn. at 9. (But that in fact is what they have done here.) The majority opinion goes on to find a conditional intent implicit in the carjacking statute

as amended, but there is absolutely no basis for such a construction. The intent required is spelled out explicitly in the statute. The other reason assigned for reading conditional intent into the statute – that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law," Maj. Opn. at 12 – is irrelevant here. There is no federal common law of crimes, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812), state criminal law supplies no authority for interpreting a federal criminal statute, and the Model Penal Code, cited in the majority opinion, never has been adopted by Congress. In point of fact, I can find no federal criminal statute that provides conditional intent as an element of the crime defined. Nor is there a general provision in the Federal Criminal Code, as there is in some state criminal codes, that the requirement of intent is satisfied by proof of conditional intent. *See, e.g.*, Haw. Rev. Stat. § 702-209 (1993) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense.")

To avoid a clear judicial usurpation of congressional authority, I would reverse and remand for a retrial upon instructions conforming with the foregoing analysis.

Supreme Court of the United States

No. 97-7164

Francois Holloway, aka Abdu Ali,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 27, 1998
